

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 AUSTIN DIVISION

4 EVDOKIA NIKOLOVA) Docket No. A 19-CA-877 RP
5 vs.)
6 UNIVERSITY OF TEXAS)
7 AT AUSTIN) Austin, Texas
8)
9) February 16, 2022

10 TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
11 VIA VIDEOCONFERENCE
12 BEFORE THE HONORABLE ROBERT L. PITMAN

13

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35 Proceedings reported by computerized stenography,
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10:30:49 1 THE COURT: Good morning, everyone. Thank you
10:30:50 2 for joining me for this hearing today.

10:30:52 3 I'm going to ask the clerk to call the case and
10:30:53 4 if you could make announcements for the record, please.

10:30:56 5 THE CLERK: A 19-CV-877, Evdokia Nikolova vs.
10:31:03 6 University of Texas at Austin, for final pretrial
10:31:05 7 conference.

10:31:08 8 MR. SCHMIDT: Yes, your Honor. This is Robert
10:31:10 9 Schmidt, or Bob Schmidt, for Plaintiff Evdokia Nikolova.
10:31:11 10 And I also have today Robert Notzon, who's representing
10:31:15 11 Dr. Nikolova.

10:31:16 12 THE COURT: Mr. Smith, Mr. Notzon.

10:31:18 13 MR. SCHMIDT: Good morning, Judge.

10:31:19 14 THE COURT: Good morning.

10:31:20 15 MR. DOWER: And Benjamin Dower, Ben Dower for
10:31:24 16 U.T. Austin, along with my colleague, Amy Hilton.

10:31:55 17 THE COURT: Well, thank you both for joining me
10:31:56 18 today for a final pretrial conference. I want to cover a
10:31:59 19 number of issues. Typically what I will do is sort of go
10:32:02 20 through my list of things that would be, I think, of
10:32:07 21 interest to you about sort of jury selection issues, other
10:32:13 22 -- hopefully answering most of the questions that you'll
10:32:15 23 have about the upcoming trial. And then, obviously please
10:32:18 24 let me know at the end, if I have left any questions
10:32:21 25 unanswered or if you have any additional issues that you'd

10:32:24 1 like to raise with me.

10:32:25 2 Let me start by inquiring as to whether or not we
10:32:28 3 are still in the posture of needing to try this case. I'm
10:32:33 4 assuming that I would have heard otherwise but, Mr.
10:32:36 5 Schmidt, you're giving me a nod there.

10:32:40 6 MR. SCHMIDT: Yes, your Honor. I'm afraid that
10:32:41 7 that's the direction that we are heading.

10:32:42 8 THE COURT: Okay. That's fine. And that's what
10:32:44 9 we're here for. Obviously you're all very experienced
10:32:47 10 lawyers and you know the risks of going to trial, and I
10:32:50 11 don't need to review that with you. But if at any point,
10:32:53 12 you need any encouragement from me that I haven't already
10:32:57 13 given you about seeking a resolution of this case, then
10:33:01 14 let me know if there's anything I can do to encourage you
10:33:03 15 in that.

10:33:04 16 But I'm also here and available to give you a
10:33:08 17 jury trial in the case. Let me start by saying that, as
10:33:11 18 you all know, civil trials are always subject to being
10:33:17 19 bumped by criminal trials because of the Speedy Trial Act
10:33:20 20 and, indeed, I am -- regret to tell you that apparently
10:33:24 21 that's what's going on with your current setting. So let
10:33:27 22 me tell you what's going on. We're currently set in this
10:33:30 23 case for a March 7th jury selection. I have a case that
10:33:35 24 has been now specially set three times, but because of
10:33:38 25 COVID -- a criminal case, because of COVID, we have

10:33:41 1 provisionally set for the week before that, but it's going
10:33:46 2 to be, by all accounts, a two-week trial.

10:33:49 3 What I would like to do is explore two
10:33:52 4 possibilities with you. First, I would like to see
10:33:55 5 whether or not -- obviously I want to get this case tried.
10:33:57 6 And I know you're in a posture of being ready and counting
10:34:00 7 on that. Sometimes these criminal cases go away, as you
10:34:05 8 know, at the last minute, and so, I am somewhat hesitant
10:34:09 9 to release you at this point because there is some
10:34:14 10 possibility that March 7th will still be available to try
10:34:17 11 this case.

10:34:19 12 I will know that for sure next Friday. What's
10:34:23 13 the date? The 25th, because I'm actually picking that
10:34:28 14 jury the Friday before the Monday that we're set to start.
10:34:30 15 So I will know on the 25th whether or not that -- the
10:34:35 16 March 7th date is taken. And so, what I would like to do
10:34:40 17 is to go ahead and keep this sort of on the March 7th
10:34:45 18 docket in the event that something happens, and then, we
10:34:47 19 will let you know promptly on Friday morning, whether or
10:34:51 20 not we're in the process of picking a jury or the case has
10:34:54 21 been resolved or continued.

10:34:56 22 I know that's not ideal because it's -- you know,
10:34:59 23 it's keeping you kind of on the line. But, you know, I
10:35:02 24 hope you can understand, having been through the last two
10:35:05 25 years of not being able to try cases, we have a bit of a

10:35:09 1 logjam and we're trying to triage cases and shoehorn
10:35:13 2 things in where we can and be as sensitive and -- to your
10:35:18 3 needs and concerns as we can while, at the same time, you
10:35:21 4 know, getting as many cases tried as possible.

10:35:23 5 So let me first ask whether or not everybody is
10:35:27 6 willing to sort of stay on line until next Friday, and
10:35:31 7 then, we'll give you a hard answer about our March 7th
10:35:34 8 date.

10:35:34 9 Mr. Schmidt, does that work for the plaintiff?

10:35:36 10 MR. SCHMIDT: Of course it does. Yes, your
10:35:38 11 Honor.

10:35:38 12 THE COURT: Okay. Mr. Dower?

10:35:39 13 MR. SCHMIDT: We totally understand. Obviously.

10:35:42 14 MR. DOWER: Yes. Obviously. The one thing I
10:35:44 15 will say is that president -- or former president of U.T.
10:35:48 16 Austin, Greg Fenves, is trying his darnedest to appear in
10:35:54 17 person, notwithstanding him being out of subpoena range,
10:35:56 18 so he can provide testimony to the Court. And I expect
10:36:01 19 when I let him know that we're in hiatus until the 25th,
10:36:05 20 he will be none too pleased to hear that, but I think he's
10:36:09 21 just going to have to live with it, just like we are. And
10:36:11 22 we obviously respect where the Court is coming from there.

10:36:14 23 THE COURT: Okay. Thank you.

10:36:15 24 Now, I want to go ahead, then, and talk about
10:36:18 25 what we will do in the event that I give you the bad news

10:36:23 1 next week that I'm going to be in criminal trial during
10:36:26 2 the week that we've planned on. And I've looked very
10:36:29 3 closely -- I'll just tell you how I'm doing this and that
10:36:32 4 is, I looked for -- I'm stacked six or eight trials deep
10:36:36 5 every Monday. And so, what I do then is for cases that
10:36:41 6 we're having to sort of look for a trial date, I go and I
10:36:45 7 compare the file date of these cases with the cases that
10:36:50 8 are currently set, and the next date where you would be a
10:36:57 9 priority setting, based on the filing date of the case,
10:37:01 10 would be April the 4th for a jury selection.

10:37:05 11 So you don't have to tell me right now, but if
10:37:08 12 you could sort of talk to each other and to your clients
10:37:13 13 and witnesses about April the 4th, that would be the next
10:37:16 14 date where you would get the priority setting. So again,
10:37:22 15 I know that's not ideal way to do things, but that's the
10:37:25 16 only way I know to do it.

10:37:27 17 And what you could do is, if you don't mind, go
10:37:29 18 ahead and for planning purposes, let us know as soon as
10:37:33 19 you have an idea of whether that's going to work for you
10:37:35 20 or not. Just e-mail Ms. Golden, and if that is the case,
10:37:41 21 then we will sort of plug you in provisionally for April
10:37:45 22 the 4th and not put anybody ahead of you while there are
10:37:47 23 plenty of people on that date already, but nobody will be
10:37:49 24 ahead of you, again, barring another criminal case.

10:37:52 25 I think that we're not anticipating that the

10:37:56 1 April 4th date would be eclipsed by a criminal case at
10:38:00 2 this point, but that's not -- I don't have perfect ability
10:38:03 3 to predict that. So -- and in the event that that is a
10:38:07 4 conflict for you, then what we would do perhaps is wait
10:38:11 5 till next Friday and after I pick that jury, maybe a
10:38:15 6 Friday afternoon, or one afternoon the following week,
10:38:19 7 have another phone conference and kind of search for
10:38:21 8 another date.

10:38:22 9 So if April 4th is not going to work, if you'd go
10:38:25 10 ahead and talk to your clients and witnesses about the
10:38:27 11 next couple of months so that at that time, we'll be able
10:38:31 12 to have all the information we need to identify a date
10:38:34 13 that we can plug in to give you a firm setting.

10:38:37 14 So any questions about that? Or issues?

10:38:41 15 MR. SCHMIDT: No, your Honor. Thanks.

10:38:44 16 MR. DOWER: No, your Honor.

10:38:44 17 THE COURT: So let's go forward, then, and talk
10:38:46 18 about -- and all these things will apply, then, regardless
10:38:48 19 of whether we go on the 7th, or 4th, or other date in the
10:38:51 20 future. I'll sort of go through the list that I have of
10:38:54 21 things that would be relevant to you and hopefully answer
10:38:57 22 many of your questions in advance.

10:38:59 23 First of all, with regard to our COVID protocols,
10:39:04 24 we are opening back up for business under the following
10:39:09 25 sort of conditions. We are only summoning jurors who are

10:39:14 1 fully vaccinated. And so, if you have any issue with
10:39:18 2 that, let me know sooner than later, but that's the way it
10:39:23 3 will be. And if you have a problem, I'll give you full
10:39:27 4 opportunity to get your objections in and for the record.
10:39:31 5 But we just believe that the evidence is so strong that
10:39:34 6 doing otherwise really puts -- to call in jurors who
10:39:38 7 either haven't been vaccinated or not being able to assure
10:39:44 8 them that other fellow jurors have been vaccinated were
10:39:46 9 just -- we're just not going to do that in the Austin
10:39:50 10 Division.

10:39:51 11 While here, we're going to have everyone's
10:39:55 12 temperature taken at the door. We have an order currently
10:39:59 13 in force where everyone remains masked at all time unless
10:40:03 14 in a speaking role, that is, counsel and witnesses. We
10:40:08 15 are going to be trying this case hopefully in the special
10:40:13 16 proceedings courtroom on the first floor because it's
10:40:18 17 significantly larger than the other district courtrooms,
10:40:21 18 and it allows for easier social distancing both for jury
10:40:25 19 selection and trial.

10:40:26 20 So we'll be trying it in the first floor
10:40:29 21 courtroom. I can't speak for April 4th on that because we
10:40:33 22 don't know yet whether -- okay. Apparently that is
10:40:36 23 available that day, as well. But if we pick another date,
10:40:39 24 it might have already been reserved. In an ideal world,
10:40:43 25 we'll be trying this in the first floor special

10:40:46 1 proceedings courtroom.

10:40:48 2 We have Hepa filters that are portable that are
10:40:53 3 around the courtroom that are circulating and filtering
10:40:58 4 the air. For any witness, lawyer, or party who is not
10:41:05 5 fully vaccinated, you need to let us know that, and we're
10:41:09 6 requiring a test before -- within 24 hours of jury
10:41:17 7 selection and then, a daily rapid test every day after
10:41:21 8 that for any lawyer, witness, staff person, or party who
10:41:27 9 is not fully vaccinated.

10:41:31 10 MR. NOTZON: Is that before coming in the
10:41:33 11 courtroom, your Honor?

10:41:33 12 THE COURT: That's correct. Yes. We don't need
10:41:35 13 to see proof of evaluation. We'll take your word for
10:41:38 14 that. But if you're unvaccinated, we will require proof
10:41:41 15 of a negative COVID test. And again, everyone will remain
10:41:49 16 masked, including jurors, except when speaking. I am
10:41:56 17 going to ask that you consider questioning the witnesses
10:42:01 18 from the counsel table while standing, if you can. But if
10:42:06 19 there are issues with being able to see the witness or you
10:42:12 20 just have a strong preference to do it from the podium,
10:42:14 21 that's fine. Just let me know that and I'll let you do it
10:42:18 22 from the podium. I don't want you to sacrifice any
10:42:20 23 ability to see the witness or to see the jury. But we're
10:42:24 24 just trying to maximize distancing, if we can.

10:42:29 25 Any questions about COVID protocols, or

10:42:31 1 questions, or issues with any of that?

10:42:35 2 MR. DOWER: Yes, your Honor. Primarily for the
10:42:37 3 purposes of error preservation, because I recognize the
10:42:40 4 Court has very strong feelings about the subject, but if
10:42:43 5 we were to object to the only summoning fully vaccinated
10:42:46 6 jurors, would we just file a brief written objection?

10:42:50 7 THE COURT: Yes. Absolutely. If you want to
10:42:52 8 preserve that as an issue for appeal, that's great.

10:42:56 9 MR. DOWER: Okay. Thank you, your Honor. That
10:42:57 10 was all I had.

10:42:58 11 THE COURT: Okay. So we will pick a jury of
10:43:02 12 seven and that is -- there will not be any alternates, but
10:43:06 13 that gives us a cushion of one juror that we might lose
10:43:11 14 during a week trial, which is very rare, but that gives us
10:43:16 15 a cushion in the event we do lose a juror. So we'll pick
10:43:20 16 seven, but all seven again will deliberate. There won't
10:43:23 17 be any that will be designated as an alternate. Each side
10:43:27 18 will have three strikes at the conclusion of the jury
10:43:33 19 questioning.

10:43:34 20 I know that you have submitted a request to do a
10:43:37 21 jury questionnaire. Those are generally disfavored in
10:43:40 22 this division. I checked and the last time we did one was
10:43:43 23 in a very significant complex case six years ago. What I
10:43:46 24 will do, though, is assure you that I will incorporate as
10:43:49 25 many of the questions as you have indicated you would like

10:43:54 1 me to ask the jury in the Court's voir dire. I will also
10:43:59 2 give each side 20 minutes to do a lawyer-led questioning
10:44:05 3 of either followup of questions that I've already asked or
10:44:10 4 to ask questions that I haven't asked yet. So feel
10:44:15 5 free -- again, 20 minutes per side. I hope that at the
10:44:21 6 conclusion of the Court's questioning, I will have
10:44:25 7 included most of the questions that you have wanted asked,
10:44:28 8 but if not, that will give you your opportunity then to
10:44:31 9 question the panel.

10:44:35 10 Let's see, the way we will do this is, rather
10:44:38 11 than in a group of however many that we would be -- have
10:44:43 12 on the initial panel, the problem that I always try to
10:44:47 13 solve is not asking questions of folks who are so far
10:44:53 14 outside the strike zone that they really -- we're wasting
10:44:58 15 time soliciting answers from people who aren't going to
10:45:02 16 ever be on a jury.

10:45:03 17 The way I try to solve that problem is, I have --
10:45:07 18 I put in an initial group of people who are in the initial
10:45:12 19 strike zone, which is the seven jurors that will
10:45:17 20 ultimately be seated plus the six peremptory strikes that
10:45:22 21 you get -- so that's 13 -- plus four that is a cushion for
10:45:27 22 folks who are challenged for cause during the Court's
10:45:30 23 questioning. So very rarely do I dismiss more than four
10:45:34 24 jurors. But as a result of that, you will be able to
10:45:39 25 identify 17 folks who you will be asking questions of.

10:45:43 1 The remainder of the twelve or however many will
10:45:45 2 be on the panel, I will come out and explain this process
10:45:49 3 to them and say, listen, we're only asking -- I'm only
10:45:53 4 asking questions of this initial group of 17, but if more
10:45:57 5 than four of this panel -- of that initial group are
10:46:00 6 challenged and excused for cause, then I will go back to
10:46:05 7 that second group and say, all right, I'm going to go
10:46:09 8 through these questions that I've already asked the first
10:46:11 9 group with you. And so, I'll say, please listen because
10:46:14 10 in the event that we have to pull you from that second
10:46:16 11 group, I'm going to ask you to recall if you've had any --
10:46:21 12 you would have had any answers to the questions I've asked
10:46:22 13 the first group.

10:46:23 14 That typically works pretty well. I don't simply
10:46:26 15 ask, would you have had any answers. I go through and
10:46:29 16 talk about the different areas that I've already covered.
10:46:31 17 That seems to be the most efficient way to do it because I
10:46:34 18 rarely have to do that. But in the event I do, it takes
10:46:38 19 far less time than if we have twelve other people who have
10:46:41 20 no chance of being on this jury going on and on about why
10:46:45 21 they either do or don't want to be on the jury. So that's
10:46:49 22 the way that works. And again, you will be able to
10:46:53 23 identify visually the 17 people who are in that initial
10:46:56 24 questioning zone.

10:46:59 25 Let's see, any questioning about voir dire that I

10:47:04 1 haven't covered so far?

10:47:07 2 MR. SCHMIDT: I have just a few quick questions,
10:47:10 3 sir. One question is, I was just curious, approximately
10:47:12 4 how long do you spend on voir dire? I know that is
10:47:14 5 probably dependent case-by-case, but I'm just curious
10:47:17 6 about that.

10:47:17 7 THE COURT: I'm pretty efficient. That's a
10:47:19 8 euphemism for pretty quick. I'm of the school of thought
10:47:24 9 that, you know, the default should be that we should be
10:47:27 10 able to get seven people off the street and put them in a
10:47:30 11 jury box and they should hear the case. So I'm not
10:47:33 12 looking for reasons to get people off of a panel. So I
10:47:39 13 don't have the same interest that perhaps each of you do
10:47:42 14 about sort of following up. I'm pretty efficient and
10:47:46 15 don't ask too many followup questions.

10:47:48 16 What I'll do, really, what it ends up being is, I
10:47:51 17 will identify folks who perhaps because of the initial
10:47:55 18 answer they gave me, you might want to use some of your 20
10:47:57 19 minutes to go back and say when you told Judge Pitman so
10:47:59 20 and so, can you tell me a little more about that kind of a
10:48:02 21 thing.

10:48:03 22 MR. SCHMIDT: Okay. And then, another question
10:48:04 23 is, approximately how big is the panel?

10:48:06 24 THE COURT: You know, usually 23. So there will
10:48:12 25 be probably in this case -- I'll look again, but in a case

10:48:15 1 this size, we'll probably have 23 in the whole panel.

10:48:18 2 MR. SCHMIDT: Okay. And continue asking
10:48:21 3 questions, will we have a seating chart? Or can you or
10:48:23 4 someone in your office tell us how they're seated so we
10:48:26 5 can make our own seating chart?

10:48:29 6 THE COURT: We will give you a seating chart, but
10:48:30 7 it won't be until immediately prior because we won't know
10:48:34 8 until that morning. We'll randomize that morning after
10:48:36 9 they show up, and then, we'll plug in their names in the
10:48:39 10 seating chart and we will give that to you before they
10:48:42 11 come out but not long -- you won't have it long enough to
10:48:46 12 like do all of your Google searches before they come out.

10:48:49 13 MR. SCHMIDT: All right. Yeah. Of course. And
10:48:52 14 then, finally, on challenges for cause, do you generally
10:48:58 15 -- is there any particular way you handle those?

10:49:00 16 THE COURT: Great question. Yeah. What I will
10:49:02 17 do is, if I'm realizing that I'm having sufficient
10:49:06 18 concerns about a juror and the response they're giving me,
10:49:11 19 I will, you know -- then I will spend a little more time
10:49:14 20 with them, getting them to elaborate on whatever issue
10:49:17 21 seems to be of concern. If I at that point am concerned
10:49:22 22 enough that they are a problem, I will summon you to the
10:49:28 23 bench at that time because if it's that apparent, I want
10:49:32 24 to do that sooner than later because we need to pull, you
10:49:35 25 know -- we need to know, you need to know sooner than

10:49:38 1 later who's going to be excluded.

10:49:40 2 If I think it's just something that I think it's
10:49:42 3 going to be on you to convince me that it's a challenge
10:49:46 4 for cause, then what I will do is wait until after all of
10:49:52 5 the questioning and give you the opportunity to come up
10:49:55 6 before I release the jury and before you exercise your
10:49:58 7 challenges to give me -- to give you the opportunity to
10:50:04 8 convince me that certain jurors should be stricken for
10:50:06 9 cause.

10:50:07 10 MR. SCHMIDT: Thank you.

10:50:09 11 MR. DOWER: A related question, your Honor. Just
10:50:11 12 based on the physical layout of the courtroom, is it such
10:50:14 13 that it's easy for counsel to approach and have a quiet
10:50:17 14 conversation with your Honor without the jury being able
10:50:20 15 to hear them?

10:50:21 16 THE COURT: Yes. Especially in that courtroom
10:50:23 17 because it's on the far side and there's a microphone at
10:50:27 18 the side of the bench so that the court reporter can hear
10:50:30 19 you with a whisper. And then, we have a noise cancelling
10:50:36 20 kind of white noise that the clerk turns on so that --
10:50:41 21 yeah. Although you typically speak very loudly.

10:50:46 22 MR. DOWER: That question is very important to
10:50:48 23 me, specifically, your Honor.

10:50:50 24 MR. SCHMIDT: Afraid I suffer from that, as well.
10:50:52 25 Let's see how loud I am in court.

10:50:54 1 THE COURT: I'll shush you if I think that the
10:50:57 2 jury can hear you.

10:50:58 3 MR. DOWER: Appreciate that. Audible shush.

10:51:02 4 THE COURT: Exactly. All right. Any other
10:51:04 5 questions so far? Okay.

10:51:07 6 So now time limits. Twenty minutes for your
10:51:11 7 opening statements, 25 minutes for closings unless at the
10:51:14 8 conclusion of the evidence, you want to try to convince me
10:51:17 9 that 25 minutes is not sufficient. The use of
10:51:22 10 demonstratives during opening, I would ask that you confer
10:51:26 11 with each other and disclose whatever you're going to use
10:51:29 12 in your opening. Beware if you -- in a minute, we're
10:51:37 13 going to talk about pre-admitted exhibits. You can use
10:51:39 14 pre-admitted exhibits. Those are exhibits that will be --
10:51:42 15 have been agreed to pre-admission by everyone. So you can
10:51:47 16 use those with the consent of counsel during your opening.

10:51:55 17 Let's see, what else. Anything about opening
10:52:01 18 statements, something just flashed in my mind. Okay.
10:52:10 19 Typically I get juries picked before lunch the first day,
10:52:12 20 and so, you should expect that we will probably -- that
10:52:16 21 the typical chronology is that we'll pick a jury, give
10:52:20 22 them an hour for lunch and come back and hit the ground
10:52:23 23 running with opening statements. And the plaintiff needs
10:52:25 24 to be ready with couple of two or three hours of testimony
10:52:32 25 for that first day.

10:52:34 1 What really I feel very strongly about is, I know
10:52:37 2 it's a great inconvenience to witnesses to have to sort of
10:52:41 3 be on call and to be sitting out there, but it's better to
10:52:44 4 inconvenience one or two people than to have a jury of
10:52:46 5 seven waiting because witnesses are not lined up and ready
10:52:52 6 to go. So be ready, in other words, to hit the ground
10:52:55 7 running and start getting evidence in front of the jury on
10:52:59 8 the first day.

10:52:59 9 On that note, I observe a kind of an unusual
10:53:04 10 trial schedule that I want to talk to you about. I don't
10:53:08 11 think either of you have tried anything since I've done
10:53:11 12 this. So the first day, we'll pick a jury at 9:00. It
10:53:15 13 will be a fairly typical day. We will go until a natural
10:53:19 14 stopping point between 5:00 and 6:00 the first day. For
10:53:23 15 every successive day, however, we will start at 8:30 and
10:53:27 16 we will end at 3:30. We will have two 20-minute breaks
10:53:32 17 spaced evenly throughout the day with no lunch break. So
10:53:36 18 again, 8:30 to 3:30 with only two 20-minute breaks during
10:53:40 19 that time period.

10:53:41 20 Now, let me tell you what that does and why I do
10:53:43 21 it. If jurors know in advance that they're not going to
10:53:48 22 have a full hour for lunch, but that they bring sufficient
10:53:51 23 snacks for two 20-minute breaks to get them to 3:30, they
10:53:56 24 are extraordinarily grateful to be done by 3:30 to go pick
10:54:02 25 up kids, to beat traffic, because some of them are, you

10:54:04 1 know, three counties away, and it gives you the
10:54:07 2 opportunity to sort of have a couple of hours to prepare
10:54:09 3 for the next day, gives me the opportunity to do some
10:54:12 4 sentencings or to take care of other court business in the
10:54:15 5 afternoon. And juries don't mind not having -- not taking
10:54:21 6 lunches if forewarned. And we can get just as many trial
10:54:26 7 hours in as if -- believe it or not, as if we do 9:00 to
10:54:31 8 6:00 with two breaks and a lunch. Taking those three
10:54:33 9 breaks, one of those being an hour lunch, getting people
10:54:36 10 in and out of the courthouse and the jury room, it's
10:54:42 11 incredibly inefficient. And so, I hope that you'll be
10:54:45 12 able to adjust to that and find that that's an efficient
10:54:48 13 way of doing things.

10:54:49 14 Now, as for how many -- I do put you on a clock.
10:54:55 15 I'm going to -- I've looked at -- obviously having been
10:55:00 16 familiar with the potential evidence in the case in the
10:55:04 17 motions that have already been considered by the Court and
10:55:07 18 looking at the witness lists that you have submitted, what
10:55:09 19 I do is, I look at all of that and I give my best
10:55:12 20 good-faith estimate of how many hours it will take you to
10:55:16 21 try the case. I will give you a number and you will
10:55:21 22 cringe and cry and gnash your teeth, and you will say that
10:55:25 23 I'm so unfair and that there's no way you can do that, and
10:55:30 24 I will say, oh, yes, you can.

10:55:35 25 But here's what I will do. In the event that I

10:55:39 1 have misjudged and you get to the conclusion of your case
10:55:43 2 and you have been efficient in getting people on and off
10:55:47 3 the stand, not covering the same ground three and four
10:55:51 4 times, not fumbled with audiovisual, all of the things
10:55:57 5 that could sort of result in delays, if you've done all of
10:56:01 6 that and you still haven't been able to get all your
10:56:03 7 evidence in, I will always give you more time so that you
10:56:06 8 can do that.

10:56:06 9 If, however, at the conclusion of the number of
10:56:09 10 hours I've given you, I think you have not made the best
10:56:12 11 use, I will have had a margin where I've been making
10:56:15 12 little notes to make a very strong record about why the
10:56:18 13 number of hours I gave you was fair to begin with and why
10:56:22 14 I'm not going to give you more. I don't know that I've
10:56:24 15 ever -- it's only come up a couple of times and I don't
10:56:28 16 think I've ever not given anybody -- have I? One time. I
10:56:32 17 have. Sorry. I have, but I made a really good record and
10:56:37 18 didn't get reversed by having limited their numbers.

10:56:41 19 So I'm trying to be fair, but I also want to give
10:56:44 20 you a real incentive to be efficient, to not sort of go
10:56:49 21 over things four and five times. The number of hours --
10:56:55 22 and this is inclusive of -- we literally have a chess
10:57:00 23 clock and this is inclusive of your direct and then, your
10:57:03 24 cross-examination, as well. And so, we will toggle and
10:57:06 25 keep track. It's exclusive of your opening statement and

10:57:10 1 final argument.

10:57:12 2 So the number of hours that you will each be
10:57:14 3 allocated for this trial will be nine hours a side, and
10:57:18 4 again, that's direct and cross at the conclusion of which,
10:57:23 5 if you have -- typically people wail and gnash their teeth
10:57:28 6 and then, they use like two-thirds of what I've given
10:57:33 7 them. So don't feel like you have to use all of it, but
10:57:36 8 that's what I'm going to allocate for this trial.

10:57:40 9 Any questions about anything that we've covered
10:57:44 10 so far? Just housekeeping, mechanical things?

10:57:51 11 MR. DOWER: I think I'm supposed to say that's
10:57:53 12 unfair and gnash my teeth. That sounds bad for my molars,
10:57:57 13 so I'm not going to do that --

10:57:57 14 THE COURT: That'll get your beard a little bit.

10:57:58 15 MR. DOWER: I did have one question. Sometimes
10:58:03 16 there's little conferences with the Court about
10:58:06 17 objections, things like that. Does the clock stop during
10:58:08 18 those?

10:58:08 19 THE COURT: It does.

10:58:10 20 MR. DOWER: And will we be able to ask --

10:58:12 21 THE COURT: Let me say this, though. If you
10:58:13 22 start requesting bench conferences too frequently, I will
10:58:16 23 tell you that the next time you do that, we're going to
10:58:19 24 keep your clock running.

10:58:21 25 MR. DOWER: That is fair.

10:58:27 1 THE COURT: All right? Any other questions?

10:58:29 2 MR. SCHMIDT: I will just also gnash and --

10:58:32 3 THE COURT: For the record.

10:58:33 4 MR. SCHMIDT: -- cry and whine because I do think

10:58:36 5 that we probably will need additional time, but we will do

10:58:39 6 everything we can to be obviously as efficient as

10:58:41 7 possible.

10:58:41 8 THE COURT: And that's all I ask. Absolutely.

10:58:43 9 MR. SCHMIDT: Just need to make that note.

10:58:45 10 On the opening and on the use of demonstratives,

10:58:47 11 I just wanted to just clarify that. So I assume something

10:58:50 12 like a PowerPoint would fall within what you're talking

10:58:53 13 about and --

10:58:54 14 THE COURT: Well, no. You don't have to disclose

10:58:58 15 it in the sense like if all you're doing is, if it's an

10:59:00 16 outline of, you know -- I don't want you to have to

10:59:03 17 disclose your trial tactics in your opening statement. If

10:59:06 18 you're using anything that is going to be an exhibit at

10:59:09 19 trial or something -- anything more than like a PowerPoint

10:59:14 20 where you're just kind of putting -- it's tracking the

10:59:16 21 opening statements that you're giving, that's fine. But

10:59:19 22 if it's going to be more than that, if you're using

10:59:21 23 evidence or doing anything that's potentially

10:59:23 24 objectionable, run it by opposing counsel first.

10:59:27 25 MR. SCHMIDT: Okay. And that would include even

10:59:30 1 pre-admitted exhibits.

10:59:31 2 THE COURT: Yeah, but the only reason they're
10:59:33 3 pre-admitted is because you both agree to it. So that
10:59:36 4 shouldn't be objectionable.

10:59:37 5 MR. SCHMIDT: Okay. Great.

10:59:39 6 THE COURT: While you're talking about that
10:59:41 7 audiovisual, if you would, please, make a trip to the
10:59:44 8 courthouse and make an appointment with Ms. Golden to see
10:59:47 9 what we have, and see how it works, and see how it marries
10:59:52 10 up with the technology you have. There's nothing more
10:59:54 11 discouraging than you getting here and figuring out that
10:59:57 12 you didn't bring the right, you know, hardware or whatever
11:00:03 13 to connect up.

11:00:04 14 I will also say it's just something that has
11:00:07 15 happened during the last two jury trials I've had, and so,
11:00:10 16 I started kind of sharing this story is, often when you
11:00:14 17 are connected live to your laptop and you are bringing
11:00:18 18 things up and down, the default is to your desktop. And
11:00:23 19 in both of the trials, the desktop has inadvertently, I
11:00:28 20 believe, contained things that were highly prejudicial.
11:00:35 21 So I think it was unintentional, but make sure that you
11:00:38 22 have a clean desktop so that you don't inadvertently when
11:00:41 23 you're going back and forth between exhibits or deposition
11:00:44 24 video, or whatever -- one of them was -- on the desktop,
11:00:50 25 there was an open file that was a photograph of a news

11:00:56 1 account of a multimillion-dollar verdict in the kind of
11:01:03 2 case we were trying. Curiously the plaintiff was the one
11:01:06 3 who had that on.

11:01:08 4 MR. SCHMIDT: Yeah. That's not appropriate to
11:01:09 5 flash that up there.

11:01:11 6 THE COURT: So that sort of thing, just please --
11:01:15 7 you know, I had to give a curative instruction and, you
11:01:17 8 know, I took the jury up and one -- I asked the juror, I
11:01:22 9 said, did anybody see anything? And one juror said yeah,
11:01:25 10 and I said, come up here and tell me. Yeah, it was a
11:01:27 11 multimillion-dollar verdict in a case just like this, and
11:01:32 12 I said oh, boy. So anyway, just word to the wise.

11:01:35 13 Okay. So let's launch now into the more
11:01:39 14 substantive issues that I have, that is, your motions in
11:01:42 15 limine. I want to go ahead and get those ruled on, and
11:01:44 16 then, we'll talk a little bit about some objections that
11:01:47 17 you've made.

11:01:51 18 MR. DOWER: Your Honor, could I make sure that
11:01:53 19 we've covered the more logistical matters if we're at a
11:01:56 20 transition point.

11:01:57 21 THE COURT: Sure.

11:01:58 22 MR. DOWER: We have a witness who we would like
11:02:00 23 to -- he's physically living in California, and then, on
11:02:05 24 top of that, his wife has a health condition that makes
11:02:09 25 her particularly vulnerable for COVID, and he would very

11:02:13 1 much like to appear remotely. And I've already talked to
11:02:15 2 Mr. Schmidt about it. He's not opposed. Should I file a
11:02:19 3 motion to allow him to appear remotely, like via Zoom like
11:02:23 4 we're doing right now?

11:02:24 5 THE COURT: No. You can -- we'll just put in the
11:02:28 6 minutes of this hearing. I don't want this to be a
11:02:31 7 regular practice, but in the event that there is a special
11:02:36 8 concern about someone with any preexisting condition that
11:02:40 9 would be of concern and it's unobjectionable, which Mr.
11:02:45 10 Schmidt, is that the case?

11:02:47 11 MR. SCHMIDT: That's correct. Yes.

11:02:48 12 THE COURT: Okay. Then I will certainly allow
11:02:50 13 that. We will have to talk about -- that will require
11:02:52 14 special setup on our end of setting up video. And we'll
11:02:58 15 have to talk about how we're going to do that and what
11:03:00 16 equipment we're going to have to bring in to get that
11:03:03 17 done. We'll do that and you can -- I'll leave that to Ms.
11:03:06 18 Golden and you can talk with her about that. But I will
11:03:10 19 allow you -- can you tell us what witness that is?

11:03:14 20 MR. DOWER: Sure. It's Dr. Tewfik. I believe
11:03:18 21 he's -- I think he's on, if not both -- I'm sure he's on
11:03:21 22 my witness list. He may also be on Bob's.

11:03:25 23 MR. SCHMIDT: He is.

11:03:27 24 MR. DOWER: Next quick logistical question, Greg
11:03:31 25 Ferves has very limited availability. If we need to take

11:03:38 1 him out of order, is that something I should just work
11:03:41 2 with Mr. Schmidt on? Or does the Court need to be
11:03:44 3 involved in that? I mean, I think, Bob, you were planning
11:03:47 4 to call him as an adverse witness, so maybe we can just
11:03:50 5 work through that. But if we were to stick with our
11:03:52 6 original setting, he's only available Monday and Tuesday
11:03:55 7 of the trial.

11:03:58 8 THE COURT: Unless he's not. University
11:04:00 9 presidents have put on their pants the same as everyone
11:04:04 10 else, and he's not going to get any special treatment in
11:04:07 11 this court.

11:04:08 12 MR. DOWER: I understand, your Honor. His pants
11:04:10 13 are being put on in Georgia, which makes it a little bit
11:04:13 14 trickier. But I understand.

11:04:14 15 THE COURT: Sure. Yeah. Obviously work out what
11:04:16 16 you can.

11:04:18 17 MR. DOWER: Okay.

11:04:18 18 THE COURT: But my favorite thing is when doctors
11:04:21 19 come in and say, you know, oh, gosh, you really need to --
11:04:24 20 I said how many years of my life have I spent in doctor's
11:04:27 21 offices waiting for them to maximize their profits. So
11:04:33 22 no. No one by virtue of their position is going to be
11:04:36 23 treated differently than any other witness.

11:04:39 24 MR. DOWER: Understood.

11:04:41 25 Some of the exhibits that I think both parties

11:04:42 1 are intending to offer are Excel spreadsheets that are --
11:04:47 2 there's no way they can be printed on eight-and-a-half.
11:04:50 3 Now, we can, you know, go to Kinko's maybe and do a big
11:04:54 4 blowup, but is that how the Court would prefer Excel
11:04:57 5 spreadsheets that have too many columns to be conveniently
11:05:01 6 printed on a normal eight-and-a-half-by-11 page?

11:05:05 7 THE COURT: You know, in terms of actually
11:05:09 8 introducing them in evidence and what format the jury
11:05:12 9 would have access to them?

11:05:13 10 MR. DOWER: Yes, your Honor.

11:05:14 11 THE COURT: I think that that will be digitally
11:05:15 12 available to them, and so, I don't think that format is
11:05:18 13 going to be a problem.

11:05:19 14 MR. DOWER: Okay. That was my question is, do
11:05:22 15 they have the ability to take into the jury room an Excel
11:05:26 16 spreadsheet in its native form?

11:05:27 17 THE COURT: All of the evidence will be digital
11:05:30 18 and available to them in the jury room.

11:05:34 19 MR. DOWER: Okay. That makes that very -- thank
11:05:36 20 you, your Honor. Oh, witness breakout rooms, will those
11:05:41 21 be available?

11:05:42 22 THE COURT: Yes. We have attorney conference
11:05:44 23 rooms and you'll have access to those throughout the
11:05:48 24 trial.

11:05:48 25 MR. DOWER: Okay. I think those are all of my

11:05:52 1 questions. Thank you, your Honor.

11:05:53 2 THE COURT: Okay. Mr. Schmidt?

11:05:54 3 MR. SCHMIDT: That reminded me of a question. Do
11:05:57 4 you want or will we be asked to provide paper copies of
11:06:00 5 any of our exhibits?

11:06:03 6 THE COURT: Only in the event that you feel like
11:06:05 7 it's something that you want me to be looking at. You'll
11:06:10 8 have the ability obviously to be -- to put it up on the
11:06:13 9 screen and -- but if you want to give the Court a courtesy
11:06:20 10 copy if it's something that you want me to have the
11:06:21 11 ability to look at, that's fine. But I typically am
11:06:24 12 paperless and I will be looking -- and I have a monitor at
11:06:27 13 the bench where I'm looking at whatever evidence you're
11:06:30 14 referring to. And so, unless you feel particularly that
11:06:32 15 you want me to have a hardcopy, I don't need hardcopies of
11:06:35 16 anything.

11:06:36 17 MR. SCHMIDT: Okay.

11:06:39 18 THE COURT: Okay. Great. Well, let's go, then,
11:06:41 19 into the motions in limine. Starting with the plaintiff's
11:06:45 20 motions, I think we have five -- and I appreciate
11:06:50 21 particularly the fact that you have been in communication
11:06:54 22 with each other on these, and you have indicated to me
11:06:58 23 what is opposed and unopposed. That's particularly
11:07:01 24 helpful.

11:07:02 25 One is granted as unopposed. Two is granted,

11:07:08 1 except for I do believe that the defendant's sort of
11:07:16 2 condition about the work done by the plaintiff's husband,
11:07:23 3 that is something that -- especially with regard to the
11:07:27 4 dossier, I think that that is something that they will be
11:07:32 5 able to get into, but with that exception, then I will
11:07:36 6 grant No. 2.

11:07:38 7 No. 3, again, with the reasonable exception of
11:07:43 8 the Plaintiff's W-2 forms as indicated in the defendant's
11:07:47 9 response, that will be granted, as well. And then, 4 and
11:07:51 10 5 are granted as unopposed.

11:07:53 11 Any questions about that?

11:07:56 12 MR. SCHMIDT: (Moves head side to side.)

11:07:58 13 THE COURT: Okay. Moving on, then, to the
11:07:59 14 defendant's, 1 is granted as agreed. Two, granted as
11:08:07 15 agreed. Three, granted as agreed. Four will be denied.
11:08:21 16 I think that that's probative. And if you have any
11:08:25 17 specific objection as it's coming in, you can do that
11:08:28 18 during trial. No. 5, I agree with the defendant's
11:08:35 19 objection there about pattern or practice. And so, I'll
11:08:38 20 grant that. And again, that's sort of a term of art that
11:08:46 21 it does not pertain in this kind of case. So I'll grant
11:08:52 22 5.

11:08:52 23 Six is denied as being probative. Seven, denied
11:09:00 24 on the same ground. Eight, 9 and 10 are sort of ones that
11:09:05 25 I wanted to visit with you a little bit about. And this

11:09:11 1 is talking about medical care, treatment, and the ability
11:09:16 2 for the plaintiff to comment on her own mental medical
11:09:27 3 psychological conditions. What I would intend to do in
11:09:32 4 these categories is, obviously if we're talking about
11:09:34 5 expert testimony on any condition, that would require
11:09:41 6 expert -- the disclosure of a report and -- then I get
11:09:49 7 that. But the plaintiff is going to be able to talk about
11:09:51 8 sort of her experiences. I mean, that's the nature of
11:09:55 9 these kinds of damages.

11:09:56 10 So let me just ask sort of, Mr. Dower, if you
11:09:59 11 could tell me what you're wanting to really avoid there,
11:10:02 12 understanding that the plaintiff is going to be --
11:10:07 13 understandably going to be able to talk about her own
11:10:11 14 experience of what she's gone through and her
11:10:13 15 interpretation of those experiences.

11:10:15 16 MR. DOWER: Yes, your Honor. I think, of course,
11:10:17 17 she'll be able to talk about her mental state, her mental
11:10:20 18 anguish from her own perspective. I think what we're
11:10:22 19 trying to avoid is something that would effectively
11:10:24 20 operate as a medical diagnosis like my denial of tenure
11:10:28 21 gave me clinical depression or made me bipolar. Something
11:10:31 22 that's -- really goes outside the realm of just lay
11:10:34 23 testimony about someone's feelings and experiences and
11:10:39 24 crosses over into the realm of sort of a layperson's
11:10:42 25 self-diagnosis.

11:10:43 1 THE COURT: Sure. Okay.

11:10:44 2 Mr. Schmidt.

11:10:45 3 MR. SCHMIDT: Your Honor, Dr. Nikolova is

11:10:50 4 obviously going to be testifying about going through

11:10:52 5 severe depression as a result of what has happened here.

11:10:57 6 She also has filed and been granted FMLA leave for having

11:11:02 7 depression. Also has seen multiple medical providers. So

11:11:07 8 I think the only thing that we would like to be able to

11:11:09 9 have her talk about is that she, again, saw medical

11:11:15 10 providers, you know, that she's gone to therapy, tried to,

11:11:17 11 you know, do things to treat herself and to deal with

11:11:21 12 this.

11:11:22 13 You know, we do agree, you know, she can't say,

11:11:24 14 my therapist told me I have depression. And so, we

11:11:28 15 certainly understand that, but we can -- I think she can

11:11:30 16 testify as to her own understanding of what her condition

11:11:32 17 is. And that's basically all we'd like to do. We'd also

11:11:36 18 point out, she -- in addition to FMLA, she had asked for a

11:11:39 19 reasonable accommodation because of her depression, which

11:11:42 20 was essentially granted. So those are the kind of things

11:11:45 21 that we see coming out and we'd like to present to the

11:11:48 22 Court and to the jury.

11:11:49 23 THE COURT: All right. As long as you don't

11:11:52 24 stray into sort of getting in front of a jury evidence of

11:11:55 25 a diagnosis about which there is no expert testimony, then

11:11:59 1 that's fine. And, you know, I think you both are
11:12:02 2 experienced, you know how to kind of manage that and stay
11:12:05 3 within those sort of boundaries. But if not, Mr. Dower,
11:12:09 4 you object and we can talk about it more.

11:12:13 5 MR. DOWER: Yes, your Honor.

11:12:13 6 THE COURT: Okay. So what I'm going to do, then,
11:12:15 7 is deny those with the understanding that if you do have
11:12:24 8 concerns about the direction of any questioning or the
11:12:28 9 response to any answer, Mr. Dower, then you can approach
11:12:30 10 and we'll discuss it.

11:12:34 11 Eleven is granted as agreed, as is 12. Okay.

11:12:49 12 Thirteen, sort of tell me what we're getting into there,
11:12:53 13 Mr. Dower, and what you're concerned about.

11:12:56 14 MR. DOWER: I guess -- well, I don't really see
11:12:59 15 this as being a probable issue. I think we're just -- we
11:13:02 16 don't want to be blind-sided by a new damages model during
11:13:07 17 the trial that we -- because we did depose the two experts
11:13:11 18 on damages. And so, we're just trying to prevent sort of
11:13:15 19 unfair surprise during trial with things that weren't
11:13:18 20 disclosed.

11:13:19 21 THE COURT: Okay. And, Mr. Schmidt, you get
11:13:21 22 that, right?

11:13:22 23 MR. SCHMIDT: Yeah, we get that. And we would
11:13:24 24 only ask -- we'll probably have our expert update their
11:13:27 25 damage model through the date of trial. And then, of

11:13:30 1 course, we made reference to emotional stress,
11:13:33 2 compensatory damages wouldn't be covered by this. But
11:13:36 3 that's the only -- we don't intend to offer new categories
11:13:40 4 of damages.

11:13:40 5 THE COURT: Okay. Great.

11:13:42 6 So I'll grant that -- I mean, I'm sorry, I'll
11:13:47 7 deny that, but, Mr. Dower, you can obviously re-urge this
11:13:50 8 if we stray into that territory.

11:13:52 9 Fourteen through 17, I'm going to deny only
11:13:55 10 because those are covered by the rules of evidence, and I
11:13:57 11 typically deny things that are otherwise prohibited by the
11:14:00 12 rules of evidence, but obviously without prejudice to you
11:14:02 13 using those if you become concerned during trial. And 18,
11:14:11 14 I think that I get that you need to establish predicate
11:14:14 15 before you can get in, but I think that there is a world
11:14:16 16 in which you could get in that evidence.

11:14:19 17 So I mean, Mr. Dower, as long as you understand
11:14:24 18 that -- as long as they establish first that there's a
11:14:30 19 person that's similarly situated, then with that, I would
11:14:33 20 be inclined to deny it and leave you the opportunity to
11:14:37 21 object in the event that they have not done that.

11:14:42 22 MR. DOWER: That's fair, your Honor. I think
11:14:43 23 this will probably be a longer topic of discussion once we
11:14:45 24 get to the exhibits. So understood.

11:14:50 25 THE COURT: Okay. Very good.

11:14:52 1 So 19, for the same reasons I believe it's
11:14:55 2 covered by the rules of evidence, so I'll deny that
11:14:57 3 without prejudice to you urging that at a later time.
11:15:02 4 So now that we do move to the exhibits, let me
11:15:07 5 ask you this. It seems to me that many, if not most, of
11:15:11 6 the objections that you have are objections that would
11:15:15 7 best be left for trial in the context of the trial and may
11:15:22 8 or may not sort of require any rulings in advance. What I
11:15:28 9 would like to do is have you -- without going exhibit by
11:15:34 10 exhibit today, what I would like for you to do is to
11:15:36 11 confer, once again, and to narrow down exhibits that you
11:15:41 12 absolutely need a ruling in advance because it's so
11:15:45 13 important to sort of maybe the theory of your case or how
11:15:50 14 you would approach things.
11:15:52 15 If you absolutely need a ruling, if you could
11:15:55 16 resubmit that in a format of -- I would like a pleading
11:16:00 17 from the two of you that would be -- these are the
11:16:03 18 exhibits that we agree there are no objections to and we
11:16:06 19 have no objection to pre-admitting them. These are
11:16:11 20 exhibits that we still have remaining objections to, but
11:16:14 21 they are ones that can be raised at trial. And three, the
11:16:19 22 small subset of issues that you would like to have another
11:16:26 23 conference before trial and get a pretrial ruling on those
11:16:32 24 exhibits.
11:16:34 25 MR. DOWER: That sounds good to me, your Honor.

11:16:36 1 I'll say in the category three, I think we're probably
11:16:39 2 going to need the Court to resolve some of the who is a
11:16:42 3 proper comparator because it has such a profound influence
11:16:45 4 on witness preparation we need to be able to talk about.

11:16:50 5 THE COURT: I'll take a look at that and that
11:16:51 6 will be the subject of our next visit, and I'll make those
11:16:54 7 rulings in advance of the trial so that you'll have that
11:16:56 8 information.

11:16:58 9 MR. SCHMIDT: Your Honor, we'll submit some
11:17:00 10 additional documentation on that, too, then.

11:17:02 11 THE COURT: Okay. Super. Okay.

11:17:04 12 So that's everything that was on my list. Let me
11:17:06 13 now give you the opportunity to follow up any questions
11:17:10 14 you might have.

11:17:11 15 Mr. Schmidt.

11:17:12 16 MR. SCHMIDT: Your Honor, I had one question for
11:17:13 17 you. We recently received a ruling on defendant's motion
11:17:19 18 to strike one of our experts. It is a professor who's an
11:17:26 19 expert on the field of discrimination and how it manifests
11:17:30 20 itself, things like student evaluations that have a bias,
11:17:33 21 particularly in the field of engineering where 80 percent
11:17:36 22 of the students are male. There's a lot of evidence that
11:17:39 23 that is, in fact -- that student evaluations can be
11:17:43 24 biased. U.T.'s own diversity dean who deals with this
11:17:49 25 issue says yes, we look at those studies, we abide by

11:17:53 1 those and we give them credence. Dean Sharon Wood, who's
11:17:57 2 a figure in this case, also was aware of that.

11:17:59 3 That kind of testimony as well as just there's
11:18:03 4 some other testimony about, for example, whether a woman
11:18:07 5 might discriminate against a woman. In this case, as you
11:18:11 6 probably are aware, Dean Wood is female, and she was the
11:18:15 7 first person to make a recommendation to deny tenure. And
11:18:19 8 there's a whole field of study that talks about that women
11:18:22 9 can, in fact, discriminate against women. So the
11:18:27 10 magistrate or Judge Hightower struck the testimony of our
11:18:31 11 witness that was going to be talking about that.

11:18:33 12 And I just wanted to kind of float with you and
11:18:36 13 let you know, I would like to file a motion for you to
11:18:42 14 review and consider that order. I do think there's some
11:18:46 15 very fatal flaws in that order and just wanted to let you
11:18:49 16 know that that may be coming your way. I don't know what
11:18:51 17 your position is on, you know, rulings by magistrates on
11:18:56 18 pretrial matters. But.

11:18:57 19 THE COURT: Obviously I give them great
11:19:00 20 deference, but if it's a case I'm going to try, I'll take
11:19:02 21 a look at it and I'm happy to consider any motions to
11:19:08 22 reconsider and will absolutely do that.

11:19:12 23 MR. SCHMIDT: Thank you sir. I wanted to just
11:19:14 24 raise that to you.

11:19:15 25 THE COURT: Sure. Great.

11:19:16 1 MR. SCHMIDT: That is all I have.

11:19:17 2 THE COURT: Okay. Mr. Dower.

11:19:19 3 MR. DOWER: I have one last thing and I'm

11:19:21 4 slightly hesitant to raise it because it sounds petty,

11:19:24 5 even from my own mind. But the plaintiff's statement of

11:19:27 6 the case is very long. It's like -- it's supposed to be a

11:19:32 7 half page and I think it's more like three-fourths,

11:19:36 8 basically twice my word count. So I didn't want to put --

11:19:43 9 can we talk a little bit more parity there in terms of

11:19:46 10 length?

11:19:46 11 THE COURT: No. Actually, I have a better

11:19:49 12 suggestion -- I'm sorry, and I'm so glad you raised that

11:19:51 13 -- is I want you both to come up together with one

11:19:53 14 unobjectionable statement of the case. And I don't think

11:19:57 15 we saw any -- and it can be however long you want it to

11:20:00 16 be. How's that?

11:20:02 17 MR. SCHMIDT: Great. And, Mr. Dower, and your

11:20:04 18 Honor, I actually started a revision of that. After I had

11:20:08 19 filed it, I had some concerns about it being too long.

11:20:10 20 So, Ben, I will work with you on that and we'll --

11:20:14 21 MR. NOTZON: That's Mr. Schmidt not blaming me.

11:20:17 22 My fault and I take total responsibility.

11:20:20 23 MR. SCHMIDT: This topic was discussed prior to

11:20:24 24 filing. But.

11:20:26 25 THE COURT: That's fine. I know you two get

11:20:28 1 carried away sometimes in your zeal.

11:20:34 2 MR. SCHMIDT: We will work with --

11:20:36 3 THE COURT: What we need is a very neutral
11:20:39 4 statement of the case that just -- you know, the purpose
11:20:42 5 of this is just to let the jury know why they're there and
11:20:45 6 so, a very neutral, mutually agreeable statement of the
11:20:52 7 facts of the case, that will be great.

11:20:54 8 And while I'm thinking of it, something else
11:20:57 9 we're going to need if you could start working on is, if
11:21:00 10 you could get together to work on a joint submission that
11:21:04 11 is proposed jury instructions where you red line whatever
11:21:09 12 your disagreements are so that we have one document in
11:21:12 13 Word format that we can go through, and it's easy for us
11:21:15 14 to see what the disputes are and be able to more easily
11:21:21 15 incorporate our rulings on which of you -- which of your
11:21:25 16 either inclusion or the language or exclusion, which is
11:21:30 17 much easier for us to do if it's done in that format.

11:21:33 18 MR. DOWER: Your Honor, I'm hesitant to ask for a
11:21:35 19 deadline, but do you have a deadline for when you would
11:21:39 20 like that submitted?

11:21:40 21 THE COURT: No. Any time before the trial is
11:21:43 22 fine. That will not be anything that we talk about until
11:21:47 23 our charge conference.

11:21:48 24 MR. DOWER: Okay. Thank you, your Honor.

11:21:50 25 THE COURT: Unless you need a deadline, I'm happy

11:21:52 1 to give you one.

11:21:53 2 MR. DOWER: Before the trial is a good deadline.

11:21:57 3 MR. SCHMIDT: You could give Mr. Dower a deadline

11:21:58 4 and we'll -- he needs a deadline but not --

11:22:02 5 THE COURT: Okay. Great. So the way it stands

11:22:05 6 now is, we're going to be in touch with you next Friday

11:22:08 7 and we'll either say we -- between now and then, you'll

11:22:13 8 let us know whether April 4th will be our backup date.

11:22:18 9 Next Friday, we will be in touch with you and tell you

11:22:21 10 that either we picked a jury and we're going to go with

11:22:24 11 April 4th, or we haven't picked a jury and we'll go on

11:22:27 12 March 7th, or we picked a jury and April 4th is not

11:22:31 13 working for you so we'll get on the line and look for

11:22:35 14 other dates.

11:22:38 15 Final thing, a note passed to me that we have not

11:22:42 16 gotten stipulated facts from you, so if you could work on

11:22:44 17 that, that'd be great. It's always helpful.

11:22:49 18 MR. SCHMIDT: Yes, your Honor.

11:22:49 19 THE COURT: Okay. Very good. Any last

11:22:51 20 questions? Complaints?

11:22:54 21 MR. NOTZON: (Moves head side to side.)

11:22:55 22 THE COURT: Comments? All right. Good.

11:22:57 23 Well, thank you all so much. Looking forward to

11:22:59 24 this. You are encouraged to continue exploring ways to

11:23:08 25 resolve this case other than going to trial. Always happy

11:23:12 1 for you to continue to do that and know that all of you
11:23:16 2 are accustomed to doing that and good at it. So please
11:23:20 3 continue to work on it. And we will be in touch with you
11:23:23 4 next Friday and let you know when we're going to proceed.

11:23:27 5 MR. SCHMIDT: All right.

11:23:28 6 MR. NOTZON: Thank you, your Honor.

11:23:29 7 MR. SCHMIDT: Thank you, your Honor.

11:23:30 8 THE COURT: Thank you all. Have a nice day.

11:23:33 9 MR. SCHMIDT: You too.

10 (Proceedings concluded.)

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3 UNITED STATES DISTRICT COURT)

4 | WESTERN DISTRICT OF TEXAS)

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